Filed 3/16/15 Assn. of Orange County Sheriffs v. County of Orange CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS,

Plaintiff and Appellant,

v.

COUNTY OF ORANGE et al.,

Defendants and Respondents;

ORANGE COUNTY EMPLOYEES ASSOCIATION,

Intervener and Respondent.

G049478

(Super. Ct. No. 30-2010-00400085)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed.

The Krolikowski Law Firm, Adam J. Krolikowski; Olins, Riviere, Coates & Bagula, Douglas F. Olins and Adam Chaikin for Plaintiff and Appellant.

Nicholas S. Chrisos, County Counsel, and Nicole M. Walsh, Deputy County Counsel, for Defendants and Respondents.

Silver, Hadden, Silver, Wexlter & Levine, Richard A. Levine and Brian Ross for Intervener and Respondent.

* * *

INTRODUCTION

The Association of Orange County Deputy Sheriffs (the Association) filed a complaint against Orange County (the County), the Orange County Sheriff's Department (the Department), and the County Sheriff Sandra Hutchens (the Sheriff), for breach of the Association's memorandum of understanding with the County (MOU) and violation of the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.).[1] The Association's claims were based on allegations defendants wrongfully transferred duties performed by deputy sheriffs to civilian employees referred to as CSAs without meeting and conferring on the issue.

The Association filed a first amended complaint which, like its original complaint, sought injunctive and mandamus relief for its claims. It also sought money damages. The trial court sustained defendants' demurrer to the first amended complaint as to each cause of action on the ground it did not state a cause of action for money damages because the Association failed to comply with the Government Claims Act (Gov. Code, § 900 et seq.) (the Act)[2] by presenting a claim before filing suit.

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[1] We refer to the County, the Department, and the Sheriff collectively as "defendants."

[2] In *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 734, the Supreme Court "adopt[ed] the practice of referring to the claims statutes as the 'Government Claims Act,' to avoid the confusion engendered by the informal short title 'Tort Claims Act.'"

The Association filed a second amended complaint which alleged compliance with "the claims filing requirements" and attached an exhibit entitled "Claim for Money or Damages Against the County of Orange" signed by the Association's counsel two weeks after the first amended complaint was filed. (Some capitalization omitted.) The trial court sustained defendants' demurrer to the second amended complaint, with leave to amend, on the ground the Association failed to timely present its damage claims before filing suit.

The Association filed a third amended complaint that eliminated the damages allegations. Instead, the third amended complaint contained a new fourth cause of action against defendants for violation of the preliminary injunction that prohibited defendants from "filling any Deputy Sheriff positions which existed in the jail system on September 24, 2010, with employees classified as CSAs other than were in effect on September 24, 2010." The Association alleged over $2,000,000 in damages for the violation of preliminary injunction cause of action.

The trial court granted defendants' motion for summary adjudication as to the violation of the preliminary injunction claim on the ground no triable issue of fact existed showing defendants violated the preliminary injunction.

The Association argues the trial court erred by sustaining the demurrer to the second amended complaint and by granting summary adjudication as to the violation of the preliminary injunction claim. The Association also argues the court abused its discretion by sustaining the defendants' evidentiary objections to the Association's evidence offered in opposition to the motion for summary adjudication.

We affirm. The Association's pleadings establish the Association failed to timely present a claim for damages as required by the Act before pursuing claims for damages against defendants. Those claims for damages are therefore barred under Government Code section 945.4, unless the Association successfully sought relief from

its failure to satisfy this requirement. The appellate record does not show the Association ever applied for such relief, under Government Code section 946.6 or otherwise. Instead, the Association jettisoned its original damages claim when it filed a third amended complaint in which it added a new cause of action for damages suffered as a result of the defendants' alleged violation of the preliminary injunction. We reject the Association's argument it sought damages that were merely incidental to the injunctive and writ relief it sought.

Even if we were to assume the trial court erred by sustaining defendants' evidentiary objections and thus consider all the evidence presented by the Association in opposition to the motion for summary adjudication, the Association failed to demonstrate the existence of a triable issue of material fact as to whether defendants violated the preliminary injunction. Summary adjudication as to that claim was therefore properly granted.

BACKGROUND

I.

THE ORIGINAL COMPLAINT; THE ISSUANCE OF THE PRELIMINARY INJUNCTION; AND THE ORANGE COUNTY EMPLOYEES ASSOCIATION'S COMPLAINT IN INTERVENTION.

In August 2010, the Association sued defendants by filing a complaint[3] against them, asserting claims for breach of the MOU and violation of the MMBA. Although the Association did not seek an award of damages, the complaint alleged as to both the breach of the MOU claim and the violation of the MMBA claim that the Association "has suffered immediate damage due to the supplanting of [the Association's] positions in the Orange County Jails, the permanent loss of bargaining unit

[3] The Association's complaint, first amended complaint, second amended complaint, and third amended complaint were all verified.

positions, and will continue to suffer loss of bargaining unit positions of Orange County Jail staffing." In the complaint, the Association sought injunctive relief preventing defendants "from changing the status quo prior to [defendants] complying with the meet and confer, bargaining and impasse procedures required" by the MOU and the MMBA. The complaint further prayed for the issuance of a peremptory writ of mandate commanding defendants to follow the requirements of the MOU and the MMBA, "concerning meet and confer, bargaining and impasse procedures on the issue of the CSA's impact on employment conditions and employer-employee relations."

In late September 2010, the trial court issued a preliminary injunction, stating, in part, that during the pendency of the action, defendants were enjoined from "[f]illing any Deputy Sheriff positions which existed in the Orange County jail system on July 30, 2010, with CSA employees other than had been in effect on July 30, 2010."

In mid-October 2010, the trial court issued a new preliminary injunction which stated: "IT IS HEREBY ORDERED that during the pendency of the above-entitled action or until further court order, the County of Orange, Orange County Sheriff's Department, and Orange County Sheriff Sandra Hutchens, Defendants/ Respondents in the above-entitled matter, their employees and agents are hereby enjoined and restrained from filling any Deputy Sheriff positions which existed in the jail system on September 24, 2010, with employees classified as CSAs other than were in effect on September 24, 2010. [¶] The above injunction shall issue and become effective upon [the Association]'s filing an undertaking in the amount of $10,000 as required by law. [¶] The Preliminary Injunction previously signed and issued by the Court on September 28, 2010, is superseded and supplanted by this Order."

Also in mid-October 2010, the Orange County Employees Association (OCEA) intervened in the action, by filing a complaint in intervention seeking, inter alia, a judicial determination the County lawfully created the CSA classification to perform

duties by employees represented by OCEA and that employees that were then occupying the CSA classification were vested with their current duties and responsibilities and were properly placed within the bargaining unit represented by OCEA.

Defendants appealed from the order issuing the preliminary injunction against them, arguing the Association failed to establish a likelihood of prevailing on the merits of its claims and further failed to show it would suffer interim harm in the absence of such an injunction. In the alternative, defendants argued the amount of the undertaking ordered by the trial court was insufficient.

We granted defendants' requests to stay the preliminary injunction and trial court proceedings (including trial) pending resolution of their appeal. In an unpublished opinion, this court affirmed the trial court's order issuing a preliminary injunction and imposing a $10,000 undertaking. (See *Assn. of Orange County Deputy Sheriffs v. County of Orange* (Sept. 28, 2011, G044502) [nonpub. opn.].)

II.

THE FIRST AMENDED COMPLAINT; THE BENCH TRIAL OF THE ASSOCIATION'S CLAIM SEEKING INJUNCTIVE RELIEF AND A WRIT OF MANDAMUS; THE TRIAL COURT SUSTAINS DEFENDANTS' DEMURRER TO THE FIRST AMENDED COMPLAINT WITH LEAVE TO AMEND FOR FAILURE TO COMPLY WITH THE ACT.

In March 2012, the trial court granted the Association leave to file a first amended complaint. The first amended complaint reiterated the Association's claims that defendants breached the MOU and violated the MMBA and sought the issuance of a writ of mandate. In the general allegations section, the first amended complaint added the allegation that the Association "seeks all relief available from this Honorable Court, including but not limited to injunctive relief and mandamus to maintain the status quo until such time that all meet and confer, bargaining and impasse procedures, including but not limited to mediation and arbitration, are completed pursuant to the MOU and the

MMBA. Further, AOCDS seeks damages in excess of $25,000." The first amended complaint restated the allegation contained in the original complaint that the Association had suffered immediate damage due to the supplanting of positions in the jails and the permanent loss of bargaining unit positions, and that it would continue to suffer loss of bargaining unit positions. The Association's prayer sought a writ of mandate and injunctive relief, but also included a new general allegation that as to its cause of action for breach of the MOU, the Association suffered damages in excess of $25,000.

The trial court "severed the injunctive and writ relief causes of action from the damages claim," and set trial on the injunctive and writ relief causes of action. Defendants filed a demurrer on grounds including that "Plaintiff's First Amended Complaint, in its entirety, and each purported cause of action therein fails to state facts sufficient to constitute a viable cause of action for money damages and any claim for money damages is barred by Plaintiff's failure to make a timely Government Claim pursuant to Government Code § 900, et seq."

Before the hearing on the defendants' demurrer, the trial court held a bench trial on the injunctive and writ relief causes of action and on OCEA's complaint in intervention. Following trial, the court granted the Association limited injunctive relief and granted OCEA the declaratory relief it sought in its complaint in intervention. The court found the creation of the CSA classification and assignment of that classification to OCEA were lawful, but the effects of the CSA classification on deputy sheriffs represented by the Association fell within the scope of representation, and were thus subject to the meet-and-confer requirements of the MMBA. The trial court found no violation of the applicable MOU.

The trial court ordered the issuance of a writ of mandate commanding defendants and the Association to immediately meet and confer on the impacts of the CSA classification on deputy sheriffs represented by the Association. The trial court also

enjoined defendants from placing any CSAs into positions not already occupied by CSAs, pending the court's determination the parties satisfied the meet-and-confer requirements.[4]

The trial court sustained defendants' demurrer to the first amended complaint with leave to amend, stating its reasons in a minute order as follows: "Failure to present claim . . . under Gov't Claims Act precludes relief even if the damages claim accompanies a writ petition [citation] and p[etitioner]'s cases do no[t] hold to the contrary; re[garding] arg[ument] that pl[aintiff] is seeking wages, compl[aint] does not allege 'pub[lic] emp[loyee]' or sal[ary]/wages, and sec 905(c) appears to apply only to sal[ary]/wages that have been earned but not p[aid] [citation]; wage claim is not merely incidental to the req[ueste]d writ relief."

III.

THE ASSOCIATION FILES THE SECOND AMENDED COMPLAINT; THE TRIAL COURT SUSTAINS DEFENDANTS' DEMURRER WITH LEAVE TO AMEND ON THE GROUND THE ASSOCIATION FAILED TO COMPLY WITH THE ACT.

In June 2012, the Association filed a second amended complaint containing the same three claims it had alleged in its prior complaints, and added in its prayer as to all causes of action, namely a request for "an award of general damages, special damages, and consequential damages against defendants for the damages suffered by plaintiff as a result of defendants' unlawful conduct pursuant to Code of Civ. Proc., § 1095 and provisions of the State and Federal Constitutions."

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[4] The Association appealed, arguing the trial court's order violated the contracts clause of the California Constitution and was otherwise inadequate. In an unpublished opinion, we affirmed the trial court's order, concluding the Association failed to demonstrate how the trial court's order issuing a writ of mandate and providing injunctive relief in favor of the Association constituted error. (See *Assn. of Orange County Deputy Sheriffs v. County of Orange* (June 21, 2013, G047102) [nonpub. opn.].)

The second amended complaint also added the allegation that "Petitioner has complied with the claims filing requirements and attaches the claim and its rejection by respondents as Exhibits 'A' and 'B' respectively." Exhibit A is a document entitled "Claim for Money or Damages Against the County of Orange" executed by the Association's attorney on March 21, 2012 (the Claim). (Some capitalization omitted.) The Claim stated that September 28, 2011 was the "[e]xact date . . . of the occurrence or transaction which gave rise to the claim asserted" and that it occurred "in the Orange County Jails and Court System." It described "the circumstances of the occurrence or transaction which [the Association] claim[ed] caused the damage/injury/loss" as follows: "The County of Orange and the Sheriff's Department (1) refused to meet and confer per the Meyers-Milias-Brown Act, (2) unilaterally implemented the Correctional Services Assistant (CSA) classification, (3) supplanted Deputy Sheriffs from their positions in violation of Court orders, (4) the CSA[s] were not removed from Deputy Sheriff positions, (5) and work was not returned to Deputy Sheriffs as of September 28, 2011." Resultant "damages/injury/loss incurred so far as is known as of the time of this claim" were described as "Deputy Sheriffs lost wages in the form of overtime due to their supplantation. The Association itself lost dues that would have been collected for those wages." The Claim stated that its computation of the amount of damages was based on a declaration of Captain Davis Nighswonger executed on October 14, 2010, regarding the additional monthly cost to the Department if the Sheriff were not permitted to use CSAs "in the capacity intended."

Exhibit B referenced in and attached to the second amended complaint is a letter from the County Counsel's office addressed to the Association's counsel, which stated that the Claim, which was presented to the clerk of the board of supervisors on March 22, 2012, was "being returned because it was not presented within one year after the occurrence or event as required by law." The letter explained: "Notwithstanding the

fact that you assert in the claim that the date of the 'occurrence or transaction' that gave rise to the claim was September 28, 2011, that date has no actual relation to the occurrences or transactions more specifically alleged in paragraph 8 of the form. The events more specifically described in itemized numbers (1)-(3) of paragraph 8 on the claim form occurred, if at all, in 2009 and 2010 rendering the claim untimely. Given the untimely nature of your claim with respect to these events, any lawsuit for damages arising from the occurrences and transactions described in the claim is barred." The letter added, "[t]o the extent that your claim or any portion thereof is deemed timely, please be advised that it is hereby rejected on the merits."

Defendants demurred to the second amended complaint on grounds, including, that "each purported cause of action therein fails to state facts sufficient to constitute a viable cause of action for money damages and any claim for money damages is barred by Plaintiff's failure to make a timely Government Claim pursuant to Government Code § 900, et seq." Defendants argued the Association could not maintain an action for money damages against defendants unless it had first presented a timely written claim and the claim has been rejected in whole or in part. Defendants argued exhibits A and B to the second amended complaint showed the claim for money damages was not presented by the Association to the clerk of the board of supervisors until March 22, 2012—well after the Association amended its operative complaint to add a cause of action for money damages on March 7, 2012.

The trial court sustained the demurrer with leave to amend for the following reasons: "Government claim for money damages against a public entity must be presented before suit [is] filed [citation]; claim must be filed even if plaintiff seeks mandate as well [citation]; damages are not incidental to writ relief as writ only requires meet and confer [citation]; even if Responding Party plaintiff suffered damages as result of violation of preliminary injunction and it is continuing injury, that is not what is

alleged; question is whether court should sustain without leave and entertain motion to amend, or sustain with leave." The court further stated "the Court having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows: [¶] The Court orders Demurrer to Second Amended Complaint—SUSTAINED with leave to amend." The court gave plaintiff 20 days' leave to file a third amended complaint.

IV.

THE ASSOCIATION FILES THE THIRD AMENDED COMPLAINT ADDING NEW CAUSE OF ACTION SEEKING DAMAGES FOR VIOLATION OF THE PRELIMINARY INJUNCTION; THE TRIAL COURT GRANTS DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION AS TO THAT CLAIM; JUDGMENT IS ENTERED AND THE ASSOCIATION APPEALS.

In October 2012, the Association filed a third amended complaint which contained a new claim against defendants for violation of the preliminary injunction and for which the Association sought the recovery of damages in excess of $2,000,000. The third amended complaint also contained the same three claims alleged in all prior complaints, but deleted references to seeking the recovery of damages as to those claims.

Defendants moved for summary adjudication of the violation of the preliminary injunction claim on the ground the undisputed facts show defendants did not violate the terms of the preliminary injunction during the dates during which it was effective. The trial court granted the motion for summary adjudication on the ground the Association failed to show the existence of a triable issue of material fact with regard to the violation of the preliminary injunction cause of action. The court stated, inter alia: "The un-rebutted Declaration of Buffy O'Neil [offered by defendants in support of their motion for summary adjudication] demonstrates that no Correctional Services Assistants ('CSA') were placed into Deputy Sheriff positions during the effective dates of the

preliminary injunction (September 24, 2010 to December 16, 2010 and November 29, 2011 to June 20, 2012)."

The court overruled the Association's objections to some of defendants' evidence; none of those rulings is at issue in this appeal and we do not further refer to them. The court sustained certain of defendants' objections to evidence submitted by the Association in opposition to the motion for summary adjudication. The court stated, however, "[e]ven if the court assumed that all of the evidence submitted by [the Association] were admissible (it is not), none of it demonstrates that CSAs were placed into Deputy Sheriff positions during the effective dates of the preliminary injunction in violation of the preliminary injunction."

The Association filed a petition for a peremptory writ of mandate in this court challenging the trial court's order granting summary adjudication. The petition was denied by a panel of this court on October 31, 2013.

On November 20, 2013, judgment was entered by the trial court, stating in part:

"Pursuant to the June 20, 2012 Order, Writ and Statement of Decision on [the Association]'s First Amended Complaint and OCERA's Cross-Complaint, and the July 3, 2013 Order Granting County/Sheriff's Motion for Summary Adjudication of [the Association]'s fourth cause of action contained in the Third Amended Complaint, IT IS HEREBY ORDERED AND ADJUDGED THAT:

"1. Judgment on the First Amended Complaint, second (MMBA/Injunctive relief) and third causes of action (MMBA/Writ of Mandate) is entered in favor of [the Association] against County/Sheriff.

"2. Judgment on the First Amended Complaint, first cause of action (for violation of the MOU) is entered in favor of County/Sheriff against [the Association].

"3. Judgment on the Third Amended Complaint, fourth cause of action for damages is entered in favor of County/Sheriff against [the Association] pursuant to the Court's Statement of Decision and Order dated June 20, 2012.

"4. Judgment on OCEA's Cross-Complaint for declaratory relief is entered in favor of OCEA against [the Association] and County/Sheriff.

"5. Prevailing parties entitled to costs of suit.

"6. Court shall retain jurisdiction to determine that County/Sheriff have complied with the Writ. Upon a determination that County/Sheriff has complied with the terms of the Writ, the Court shall discharge the Writ and dissolve the accompanying injunction."

The Association appealed.

DISCUSSION

I.

THE TRIAL COURT DID NOT ERR BY SUSTAINING THE DEMURRER TO THE SECOND AMENDED COMPLAINT.

A.

Standard of Review

A judgment following the sustaining of a demurrer is reviewed under the de novo standard. (*McCutchen v. City of Montclair* (1999) 73 Cal.App.4th 1138, 1144.) We treat the properly pleaded allegations of a challenged complaint as true. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118.)

We consider only the allegations of a challenged complaint and matters subject to judicial notice to determine whether the facts alleged state a cause of action under any theory. (*American Airlines, Inc. v. County of San Mateo, supra,* 12 Cal.4th at p. 1118.) "'Further, we give the complaint a reasonable interpretation, reading it as a

whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]'" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

B.

The Second Amended Complaint Was Properly Sustained with Leave to Amend.

The first time the Association sought money damages in this action was when it filed its first amended complaint on March 7, 2012, in which it prayed for the recovery of money damages only as to the first cause of action for breach of the MOU. By the time the trial court ruled on the demurrer to the first amended complaint, it had found, following the bifurcated trial, that defendants had not violated the MOU. After the trial court sustained defendants' demurrer to the first amended complaint for failure to allege compliance with the Act, the Association filed the second amended complaint in which it alleged it was in compliance with the Act because it presented the Claim on March 21, 2012. The second amended complaint prayed for damages in connection with all causes of action, but it asserted the same damages claimed in the first amended complaint.

As we discuss in detail *post*, the demurrer to the second amended complaint was properly sustained because the complaint did not show the Association presented its claim for damages in compliance with the Act before filing suit, and did not show the Association ever applied to defendants or to the trial court for leave to present a late claim for damages, pursuant to Government Code sections 911.4 and 946.6. The claimed damages are not incidental to its requested writ relief so as to render them exempt from the claim presentation requirement. The Association did not allege facts supporting a continuing injury theory or argue the impact such a theory would have on the presentation requirement. Demurrer was the proper vehicle to challenge the Association's claim to recover damages.

1.

The Association Failed to Present Its Claims for Damages Before Filing Suit, in Violation of the Act.

"Government Code section 905 requires that 'all claims for money or damages against local public entities' be presented to the responsible public entity before a lawsuit is filed. Failure to present a timely claim bars suit against the entity. (§ 945.4.)" (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 734, fn. omitted.) Government Code section 945.4 provides in relevant part: "[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division."

"When a claim that is required by Section 911.2[5] to be presented not later than six months after the accrual of the cause of action is not presented within that time, a written application may be made to the public entity for leave to present that claim." (Gov. Code, § 911.4, subd. (a).) Such an application "shall be presented to the public entity . . . within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim. The proposed claim shall be attached to the application." (*Id.*, § 911.4, subd. (b).)

The second amended complaint did not include any factual allegations regarding damages that were not included in the first amended complaint filed on March 7, 2012. As to the violation of the MMBA claim, the second amended complaint

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[5] Government Code section 911.2, subdivision (a) provides: "A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) not later than one year after the accrual of the cause of action."

generally alleged the Association "has suffered immediate damage due to the supplanting of [the Association's] positions in the Orange County Jails, the permanent loss of bargaining unit positions, and will continue to suffer loss of bargaining unit positions of Orange County Jail staffing." That allegation, however, was not only included in the first amended complaint, it was in the original complaint filed in August 2010. The second amended complaint only added a prayer for an award of damages as to all causes of action pursuant to Code of Civil Procedure section 1095.

Nothing in the second amended complaint suggests that the Association sought a recovery for damages that was different from damages already alleged in the first amended complaint and that had *accrued* within the statutorily prescribed time frame that would render timely the presentation of its claim on March 21, 2012. (See Gov. Code, § 911.4, subd. (a).) Instead, the second amended complaint contained the same claims and sought the same damages it had sought through the first amended complaint, which was filed before it had attempted to comply with the presentation requirement of the Act.

2.

The Second Amended Complaint Did Not Allege the Association Sought Relief from Its Failure to Timely Present Its Damages Claim.

Government Code section 946.6 provides a procedure for obtaining judicial relief from the failure to file a timely claim should the public entity deny the application to present the untimely claim, in part, as follows: "If an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from Section 945.4. The proper court for filing the petition is a superior court that would be a proper court for the trial of an action on the cause of action to which the claim relates." Subdivision (b) of section 946.6 provides that a petition for judicial relief shall show (1) that an application was made to

the board for relief under Government Code section 911.4 and that it was denied or deemed denied; (2) the reason for the petitioner's failure to present the claim within the time limits specified in Government Code section 911.2; and (3) the information required by Government Code section 910.[6]

Judicial relief from the bar of Government Code section 945.4 shall be provided to a petitioner pursuant to Government Code section 946.6, subdivision (c), which provides: "The court shall relieve the petitioner from the requirements of Section 945.4 if the court finds that the application to the board under Section 911.4 was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 and was denied or deemed denied pursuant to Section 911.6 and that one or more of the following is applicable: [¶] (1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4. [¶] (2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim. [¶] (3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of that disability failed to present a claim during that time. [¶] (4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim."

The appellate record does not show the Association made any effort to seek relief from its failure to comply with the Act before seeking damages against defendants.

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[6] Section 910 of the Government Code sets forth the requirements for a claim, including the claimant's contact information and details regarding the date, place, and other circumstances pertaining to the claim.

We note that in sustaining the demurrer to the second amended complaint, the trial court again granted the Association leave to further amend its pleading regarding its damages allegations as to its claims for breach of the MOU, breach of the MMBA, and request for the issuance of a writ of mandate. Instead of amending its pleading to allege facts showing an excuse from compliance or to allege its efforts to seek relief from its failure to comply with the Act, the Association filed the third amended complaint that omitted any damages allegations as to the original three causes of action and added a fourth cause of action against defendants seeking damages for defendants' alleged violation of the preliminary injunction.

Citing *Bell v. Tri-City Hospital Dist.* (1987) 196 Cal.App.3d 438, the Association argues the allegations in the second amended complaint showing that it presented the Claim in March 2012 were sufficient to comply with the Act. In *Bell v. Tri-City Hosp. Dist.*, the plaintiffs filed a lawsuit for damages against a public entity before having complied with the Act. (*Bell v. Tri-City Hospital Dist.*, *supra*, at p. 441.) Unlike the instant case, however, the plaintiffs applied to the public entity for leave to file a late claim under Government Code section 911.4. (*Bell v. Tri-City Hospital Dist.*, *supra*, at p. 441.) After the public entity denied the late claim application, the plaintiffs successfully petitioned the trial court for relief from the written claim requirement. (*Id.* at p. 442.) The record in this case does not show the Association has made any such efforts.

3.

The Association Failed to Show Its Claim for Damages Is Exempt from the Act.

The Association argues that because it sought a writ of mandamus, it is entitled, under Code of Civil Procedure section 1095,[7] to pursue damages which are

[7] Code of Civil Procedure section 1095 provides: "If judgment be given for the applicant, the applicant may recover the damages which the applicant has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and a peremptory mandate must also be awarded without

merely "incidental" to its requested writ relief and thus exempt from the presentation requirement. "'Those actions which seek injunctive or declaratory relief and certain actions in mandamus, . . . and where money is an incident thereto, are exempted from [the Act]." (*Eureka Teacher's Assn v. Board. of Education.* (1988) 202 Cal.App.3d 469, 475.)

In its opening appellate brief, the Association argues it should be entitled to proceed on its claims for damages in the alleged amount of at least $23,980 per pay period, "incidental" to defendants' alleged transfer of deputy sheriff positions to CSAs without first meeting and conferring in violation of the MMBA. In *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1163-1164, the appellate court held: "We are not persuaded that substantial civil penalties and actual damages do not constitute 'money or damages' within the meaning of the Government Claims Act. While there appears to be a split of authority over whether money damages that may be 'incidental' to a claim for equitable relief are subject to the claim filing requirement of the Government Claims Act, we are aware of no case that holds that civil penalties of the type sought here ($25,000 per incident) and actual damages that are the primary relief sought and not merely 'incidental' to injunctive or other extraordinary relief, do not constitute a claim for 'money or damages' in the first instance."

We conclude the Association's claimed damages are not merely incidental to the Association's request for equitable relief because they are not merely incidental to defendants' alleged failure to meet and confer regarding assignment of CSAs. Indeed, those claimed damages are and always have been the damages sought by the Association. The Association does not cite any legal authority that supports its argument. Thus, the

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delay. Damages and costs may be enforced in the manner provided for money judgments generally. . . ."

Association was required to comply with the Act before seeking damages against defendants.

In its opening appellate brief, citing to evidence it submitted in support of its motion for summary judgment, the Association argues defendants have continued to supplant deputy sheriffs "so that the number of Deputy Sheriff positions lost to CSAs reached about 141 CSA's in March 2012." Plaintiff did not make such an allegation in the second amended complaint; even though leave to amend was granted, the Association did not assert such an allegation in the third amended complaint either. We therefore do not address whether such an allegation might have supported a continuing injury theory or whether such an allegation would have otherwise affected the applicability of the Act to the Association's claim for damages.

4.

Demurrer Was Appropriate to Challenge the Association's Claim for Damages.

The Association also argues "[a] demurrer is not the appropriate vehicle to challenge a portion of a cause of action demanding an improper remedy." As discussed *ante*, the Association's claims for breach of the MOU, violation of the MMBA and mandamus relief were already tried to the court for purposes of determining the availability of injunctive relief or the issuance of a writ of mandamus. The second amended complaint, to which defendants demurred, contained the same claims but only as they related to the recovery of damages. The California Supreme Court in *State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1243 held that "a plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirement. Otherwise, his complaint *is subject to a general demurrer* for failure to state facts sufficient to constitute a cause of action." (Italics added.) Therefore, a demurrer was the proper procedural vehicle to challenge the Association's claims solely

seeking damages on the ground the Association failed to comply with the Act. The trial court did not err by sustaining defendants' demurrer to the second amended complaint.

II.

SUMMARY ADJUDICATION WAS PROPERLY GRANTED AS TO THE CAUSE OF ACTION FOR VIOLATION OF THE PRELIMINARY INJUNCTION IN THE THIRD AMENDED COMPLAINT.

The Association contends the trial court erred by granting the motion for summary adjudication as to the cause of action for violation of the preliminary injunction because the trial court erred by sustaining certain of defendants' objections to the Association's evidence. We do not need to review whether any of the challenged evidentiary rulings were in error because, for the reasons we will explain, the Association's evidence as a whole did not rebut defendants' evidence showing they did not violate the preliminary injunction. The Association failed to show the existence of a triable issue of material fact as to that claim.

A.

Applicable Standard of Review and Burdens of Proof

"We review orders granting summary judgment or summary adjudication de novo. [Citations.] A motion for summary judgment or summary adjudication is properly granted if the moving papers establish there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citations.]" (*Mooney v. County of Orange* (2013) 212 Cal.App.4th 865, 872.) "'The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish, a prima facie case . . . ." [Citation.]' [Citation.] '[O]nce a moving defendant has "shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established," the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff "may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts

showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]' [Citation.]" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.) We "'"liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party."'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.)

B.

The Parties Agree on the Terms and the Effective Dates of the Preliminary Injunction.

The Association's responsive separate statement reflects the parties' agreement as to the scope and the effective dates of the preliminary injunction, summarized as follows. The preliminary injunction, as modified, had an effective date of September 24, 2010, and enjoined the Sheriff from filling any deputy sheriff positions which existed in the jail system on September 24, 2010, with employees classified as CSAs. Defendants appealed from the order granting the preliminary injunction and, on December 16, 2010, successfully obtained an immediate stay of the preliminary injunction, which would remain in effect until this court's opinion in defendants' appeal became final. On September 28, 2011, this court affirmed the issuance of the preliminary injunction against defendants and the stay was lifted effective November 29, 2011. On June 20, 2012, the trial court issued its statement of decision and order and vacated the preliminary injunction.

C.

The Association Failed to Produce Evidence Rebutting Defendants' Evidence Showing They Did Not Violate the Preliminary Injunction.

In support of the motion for summary adjudication, defendants submitted the declaration of the Department's human resources manager, Buffy O'Neil, in which O'Neil stated: "In my position of the Human Resource Manager for the OCSD, I oversaw the adoption and implementation of the Correctional Services Assistant

('CSA') position within the OCSD. I am aware of all instances when CSAs have been hired and/or utilized to positions in the County jail system." She further stated: "Based upon my personal knowledge and on my position as the Human Resources Manager, there were no CSAs who were utilized for filling any Deputy Sheriff positions which existed in the jail system on September 24, 2010, other than were in effect on September 24, 2010, during the dates the Preliminary Injunction was in effect, specifically from: (a) September 24, 2010 (the effective date) through December 16, 2010 (when the stay was issued by the Court of Appeal, Case No. G044502); and (b) November 29, 2011 (the date of the finality of the Court of Appeal Opinion) through June 20, 2012 (the date the Preliminary Injunction was vacated)."

In opposition to the motion, the Association submitted the declaration of its counsel, Adam Krolikowski, in which he stated "Defendants refused to comply with the Preliminary Injunction as written," citing to a letter, dated November 29, 2011, from County Counsel and addressed to Krolikowski stating that "The Sheriff is in compliance with the preliminary injunction effective upon the finality of the Court of Appeal[] decision . . . as that decision directs. Nothing in the Court of Appeal[] decision, wherein the stay on the preliminary injunction was lifted, requires the Sheriff to alter staffing in the jails retroactive to the levels that existed on September 24, 2010. Indeed, the Court of Appeal[] found that the injunction is prohibitory not mandatory in nature, which means that only prospective (not retroactive) compliance is required." Neither Krolikowski's assertion nor the November 29, 2011 letter shows that defendants violated the preliminary injunction.

Krolikowski's declaration also asserted: "After Remittitur issued and the stay on the Preliminary Injunction was lifted, Defendants continued their violation of the Preliminary Injunction. During this time period, several positions formerly belonging to Deputy Sheriffs were given to CSAs. (True and correct copies of County of Orange

Master Position Control Authorized Positions and Watch Lists providing examples of Deputy Sheriff positions and duties reassigned to CSAs after the institution of the Preliminary Injunction are attached hereto as Exhibit 5.)" Exhibit 5 consists of several pages of spreadsheets with undefined codes and abbreviations. Several of the pages have the heading "SHERIFF COURT OPERATIONS" (boldface omitted); the preliminary injunction applied to jail operations only. The Association did not provide any evidence regarding the creation of the documents or how they should be interpreted. These documents do not show on their face the placement of CSAs, during the effective dates of the preliminary injunction, in positions that were deputy sheriff positions as of September 24, 2010. Consequently, they do not rebut O'Neil's declaration and cannot create a triable issue of material fact as to whether defendants violated the preliminary injunction.

Krolikowski's declaration also cites the declarations and deposition testimony of Nighswonger regarding the increasing number of CSAs working in the jail system. The preliminary injunction, however, did not prohibit defendants' utilization of CSAs in the jail system. It only prohibited their assignment, during the effective dates of the preliminary injunction, to positions that were deputy sheriff positions as of September 24, 2010.

As the Association failed to produce any evidence that even a single CSA was placed in a position that had been a deputy sheriff position as of September 24, 2010, during the effective dates of the preliminary injunction, summary adjudication was properly granted as to the cause of action for violation of the preliminary injunction.

III.

THE ASSOCIATION HAS NOT CHALLENGED THE JUDGMENT AS TO OCEA.

OCEA filed a respondent's brief in this case, arguing that the trial court properly awarded it declaratory relief in its favor following the court trial on the

Association's claims against defendants and on OCEA's cross-complaint. As acknowledged by the Association in its reply brief, the Association has not challenged any aspect of the judgment as it pertains to OCEA in this appeal. We therefore do not need to address OCEA's arguments in favor of upholding the judgment in this case.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.